IN THE

Supreme Court of the United States

October Term, 1944

No. 666

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

No. 667

THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ET AL.,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR UNION PETITIONERS

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SUBJECT INDEX.

PAGE

I.—The basic issue as stated by the respondent itself; and the effect of the respondent's concessions 1

II.—The respondent seeks to avoid its own concessions by falling back on its own version of disputed matters of fact which were never submitted to the jury, which the trial court held irrelevant, and as to which the trial court refused all our requests to charge 7

III.—The respondent's attempt to present the agreements of 1936 and 1938 as a "boycott" of articles made by non-conforming employers or by non-union labor operates, on analysis, against the respondent itself 10

IV.—The respondent's effort (pp. 2, 20) to present the agreements of 1936 and 1938 as nothing but an undertaking by local manufacturers not to purchase millwork from other states, made under a lower wage scale, is a distortion of those agreements and is irrelevant to the issues on this review 12

V.—The actual differences between the present case and the Allen Bradley Company case (145 Fed. (2d) 215) 14

VI.—The respondent's own concessions illustrate why the decisions which it cites are wholly inapplicable 16

U. S. v. Brims, 272 U. S. 549 16

The Second Coronado Case, 268 U. S. 295 17

The Borden Case, 308 U. S. 188 18

VII.—The respondent's brief has not justified the erroneous instructions and refusals to instruct concerning criminal liability of the unions for the acts of agents 18

CASES CITED

	PAGE
Allen Bradley Co., et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al., 145 Fed. (2) 215	14
Bedford Cut Stone Co. v. Stone Cutters Ass'n, 274 U. S. 37	10, 16, 17
Columbia River Packers Assn. v. Hinton, 315 U. S. 143	4
Coronado Co. v. United Mine Workers, 268 U. S. 295	17
Duplex Co. v. Deering, 254 U. S. 443	10
New York Central R. R. v. U. S., 212 U. S. 481	19
United States v. American Federation of Musicians, 318 U. S. 741	11
United States v. Borden, 308 U. S. 188	18
United States v. Brims, 272 U. S. 549	16, 17
United States v. Hutcheson, 312 U. S. 219	9, 10, 11
United States v. International Fur Workers Union, 100 Fed. (2d) 541	20
Washington Gaslight Co. v. Lansden, 172 U. S. 534	19

STATUTES CITED

Clayton Act:	
29 U.S.C. Ann., 52	9, 10, 14
Norris-LaGuardia Act:	
29 U.S.C. Ann., 104	9, 14
29 U.S.C. Ann., 106	18
29 U.S.C. Ann., 113	8
Sherman Act:	
Section 1 of Act of July 2, 1890, 26 Stat. 209	1, 2

MISCELLANEOUS

Harvard Law Review, December, 1944	14, 15

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I

The basic issue as stated by the respondent itself; and the effect of the respondent's concessions.

(1) In substance and effect, the basic issue, as stated by the respondent itself, is whether the written agreements of 1936 and 1938 are violative of Section 1 of the Sherman Act as matter of law (p. 20).

The respondent must sustain the affirmative of that issue. In no other way can it justify the directive charge to the jury and the wholesale refusals of all the union defendants' requests to charge.

(2) Indeed, the respondent realizes and expressly concedes that it must go even further, to wit, that these written agreements of 1936 and 1938 were violative of Section 1 of the Sherman Act, notwithstanding that (p. 21):

> "it [such agreement] was entered into as an incident to a dispute between employers and employees concerning terms or conditions of employment or that the union group participated in the agreement for the purpose of promoting their own self-interest."

(3) And with further frankness and inevitability the respondent's brief also concedes (p. 26):

> "It may be conceded that the validity of the convictions of the petitioners who stood trial must be tested upon the assumption that the agreement not to purchase low-cost and low-wage-scale millwork grew out of such a dispute [between employers and employees concerning terms or conditions of employment]."

(4) Still further narrowing the basic issue of law, the respondent's brief expressly states and concedes (p. 28) that, within the definition of the Norris-LaGuardia Act, the union defendants were engaged in a labor dispute not only with the employers in the Bay Area but also with the "*out-of-State*" employers who imposed less favorable wages and working conditions. To quote this important and realistic concession (p. 28):

> "It is true that under the broad definition of parties to a labor dispute contained in Section 13 of the Norris-La Guardia Act, the out-of-State producers of mill work would be parties to a labor dispute be-

tween the Bay Area manufacturers and their employees. It is also true that Section 20 (of the Clayton Act) immunizes 'ceasing to patronize' a party to a labor dispute or 'recommending, advising or persuading others * * * so to do'."

The vital importance of this concession by the respondent is that, even if (contrary to the fact) the written agreements of 1936 and 1938 could be regarded as ending a current labor dispute between the union defendants and the signatory Bay Area employers, those agreements could not at all be regarded as ending the concededly existing and continuous labor dispute between the union defendants and the non-conforming "out-of-State" employers (1501, 1499), and between the union defendants and the rival CIO which was engaged in a campaign to capture the industry (817-8, 1500-7, 1456-7, 1190, 1566). Articles bearing the union label of the United Brotherhood were worked on, irrespective of any other consideration (982, 896-901).

Hence, this basic and unavoidable concession does four things:

(1) It knocks the foundation out from under the decision of the Circuit Court of Appeals by destroying its fundamental predicate that the Norris-La Guardia Act had no application because, by reason of the making of the 1936 and 1938 agreements, "the dispute is past" (1684).

(2) It also knocks the foundation out from under the trial court's charge to the jury which never mentioned the Clayton Act or the Norris-LaGuardia Act and obviously deemed them irrelevant because as "the result" of such agreements there had been "the settlement of a labor dispute" (1152).

(3) It also knocks the foundation out from under the conviction because the trial court failed and refused to give as an instruction to the jury the very principles of law which the respondent now concedes to be sound (1546-9).

(4) It also knocks the foundation out from under the respondent's own argument (p. 21) that the conviction can be sustained as matter of law on the theory of a "boycott" against such "out-of-State" employers.

(5) Actually, the written agreements of 1936 and 1938 were not, even as between the union defendants and the signatory Bay Area employers, "the end" of a labor dispute, but rather were mere temporary revocable *truces*,—or, as the respondent's own brief aptly puts it, were merely "an *incident* to a dispute between employers and employees concerning terms or conditions of employment" (p. 21). (See Main Brief for United Brotherhood, p. 6, and Main Brief for Bay Counties District Council, pp. 10, *et seq.*). "The employer-employee relationship was the matrix of the controversy." *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143, 146.

Hence, even as between the defendant unions and the signatory Bay Area employers, the basic ruling of the courts below that the Norris-LaGuardia Act was irrelevant as a matter of law because "the dispute is past" (p. 1684), was erroneous. That ruling not only misconceived the nature and extent of the immunization by the Clayton and Norris-LaGuardia Acts, but it also erroneously took from the jury consideration of the real effect of such agreements as mere temporary, unstable and revocable truces in a continuous labor dispute with the Bay Area employers, and erroneously gave to those agreements the effect of finality and termination as a matter of law.

But, even if this were otherwise, the respondent's concession last above-quoted entirely destroys the whole hypothesis of a "past" or "ended" labor dispute and hence inevitably upsets the conviction, because the agreements of 1936 and 1938 were *not* made with the "out-of-State" employers and hence did not end even for a moment the labor dispute with them.

Indeed, so far from ending any labor dispute with such "out-of-State" employers, the agreements were effective weapons in continuing and pressing home the unions' side of their continuing and active labor dispute with all non-conforming employers and with the rival CIO union. They constituted continuous union pressure on all employers (out-of-state and otherwise) who were imposing less favorable wages and working conditions, to bring up their wages and working conditions to the standards set in these agreements and thus to accept unionization and the improvement of the living and working conditions of employees in areas of the industry in addition to the Bay Area.

All this illustrates the truth of the following statement in our Main Brief for the United Brotherhood (p. 7):

> "The long-range view of the unions was to promote wages and unionization throughout the entire industry everywhere."

(6) In consequence, the respondent's concession last above-quoted not only upsets the theory of the charge to the jury and the theory of the affirmance in the Circuit Court of Appeals, but it also makes clearly erroneous the refusal of various requests for instructions presented by the union defendants (1175 *et seq.*, 1546).

For example, the concession makes erroneous the refusal to charge Request No. 76 (1178, 1546):

> "An attempt to unionize non-union workers and improve working conditions of labor employed in an industry involves a labor dispute within the meaning of the Norris-LaGuardia Act, and such activity on the part of a labor union is therefore exempted from the operation of the Sherman Act, and does not violate that Act."

The concession also makes erroneous the refusal to charge Request No. 77 (1178, 1546-7):

"You are instructed that a labor dispute 'includes any controversy covering terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.' A person is participating or interested in a labor dispute if he is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation."

The concession also makes erroneous the refusal to charge Request No. 78, the main portion of which is (1179, 1547):

"A case involves or grows out of a labor dispute when it involves persons engaged in the same industry, trade, craft or occupation, or who have direct or indirect interests therein and a person or association shall be held to be participating or interested in a labor dispute if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs. The term 'labor dispute' includes any controversy concerning terms or conditions of employment."

The concession also makes erroneous the refusal to charge Request No. 97 (1190, 1566):

"You are instructed that the union defendants have the right to decline work or agree not to work upon products made by a CIO or a company union in carrying out their own labor objectives."

So, likewise, as to Request No. 79 (1180, 1549).

II

The respondent seeks to avoid its own concessions by falling back on its own version of disputed matters of fact which were never submitted to the jury, which the trial court held irrelevant, and as to which the trial court refused all our requests to charge.

(1) At page 26 the respondent seeks to avoid its own concessions as to the determinative issues and as to the applicable law, by stating:

> "Here, however, the purpose and effect of the combination was to suppress competition in interstate commerce of goods made by others; its object was not to compel employer accession to any union demands by raising wages, reducing hours, union recognition, or other labor objectives; it was intended to have and had the effect of raising prices and reducing competition. In these circumstances we think that the decision in the *Apex* case affords no basis for immunizing the combination involved here."

To use a colloquialism, this statement is merely an effort by respondent to lift itself by its own boot straps. It is merely the respondent's version of disputed matters of fact.

No such statement of a purpose, object and effect on the part of the union defendants is contained in the agreements of 1936 and 1938; and no such formulation of issues was given to the jury. On the contrary, the jury was told that the "sole" question before it was whether these agreements "intended to *or did* restrain the shipment of millwork and patterned lumber in interstate commerce" (1153).

The respondent's own express concession that the verdict cannot stand if the trial court erroneously ruled that it was no defense "that the union group participated in the agreement for the purpose of promoting their own

self interest" (p. 21), shows the fallacy and irrelevance of the respondent's above-quoted attempt to predicate the relevance of an opposite purpose and to assume that such opposite purpose was proven as a matter of law.

As a matter of fact, the agreement of 1936 itself asserted that Paragraph 16 was "in the interest of standardization of rates of wages and working conditions" (p. 283). Thus the agreement predicated the integration of that paragraph with a labor dispute, and also predicated a labor objective as the objective of the paragraph itself. These predicates and this labor objective were reasserted and confirmed by the sole standard provided in the agreement for the operation of the paragraph itself, to wit: conformity "to the rates of wages and working conditions of this agreement" (284).

(2) Moreover, the respondent, in making the above-quoted assertions on page 26 of its brief, has overlooked its own concession made on page 28 and discussed in the preceding Point hereof, that under the definitions in Section 113 of the Norris-LaGuardia Act, (U. S. C. Ann.), "the out-of-State producers of mill work would be parties to a labor dispute" with these union defendants. In consequence, these union defendants were fully entitled to utilize; as a weapon in their economic conflict with "the out-of-State producers of mill work" and all other non-conforming employers, insistence on conformity to the rates of wages and working conditions in the 1936 agreement, and thereby to seek to force all non-conforming employers to accept unionization and the agreed rates of wages and working conditions,—for the benefit of the whole union cause and of all union members.

By the very terms of the Norris-LaGuardia Act and the Clayton Act, union labor could lawfully and "in concert" cease or refuse to perform any work, terminate any relation of employment, cease "to patronize", or employ any party to a labor dispute, persuade or advise

others by lawful means so to do, and agree with others to do or not to do any of such acts. Such acts are not "violations of any law of the United States". (Clayton Act, Sec. 52; Norris-LaGuardia Act, Sec. 104; U.S.C., Ann., Title 29.)

Since, therefore, the respondent concedes that the economic conflict with the non-signing and non-conforming employers remained a labor dispute, unsettled and unended by the agreements of 1936 and 1938 (p. 28), the respondent cannot argue that the closed shop created by such agreements and limited to articles not conforming in wages and working conditions was an illegal and illicit defense measure by the union defendants as against the non-signing and non-conforming employers and as against the rival and militant CIO (817, 818, 1499, 1500-7, 1456-7, 1190, 1566).

"As an incident to" such unsettled and unended labor dispute (resp.'s brief, p. 21), such a closed shop so limited was expressly immunized, as regards the union defendants, by the Clayton and Norris-La Guardia Acts.

In this connection it is significant that the respondent's brief argues only the language of the Clayton Act, notwithstanding that the *Hutcheson* decision, 312 U.S. 219, 231, holds that the Sherman Act, the Clayton Act and the Norris-LaGuardia Act are "interlacing statutes" (p. 232) and "a harmonizing text of outlawry of labor conduct" (p. 231).

III

The respondent's attempt to present the agreements of 1936 and 1938 as a "boycott" of articles made by non-conforming employers or by non-union labor operates, on analysis, against the respondent itself.

(1) The respondent's resort to the invidious terminology of "boycott" really means, when logically pursued, that the respondent is attempting (doubtless unwittingly) to restore the doctrine in the *Bedford Cut Stone Co.* case, 274 U. S. 37, and in the *Duplex Co.* case, 254 U. S. 443, notwithstanding that that doctrine has been legislatively overruled by the Norris-LaGuardia Act and has also been judicially overruled in *United States* v. *Hutcheson*, 312 U. S. 219.

Indeed, the respondent's brief actually cites both those decisions as still "settled" judicial authority (p. 40).

In fact, the logical end of the respondent's pursuit of the "boycott" theme goes even further.

In the *Bedford* and *Duplex* cases, all that was held was that a union boycott of articles belonging to persons not parties to the union-employer dispute was a secondary boycott and violative of the Sherman Act. But, in the present case, the articles said to be "boycotted" were, according to the concession in the respondent's own brief (p. 28), articles belonging to and made by non-conforming employers with whom the union defendants had a present and continuing labor dispute as defined in Section 113 of the Norris-La Guardia Act (U. S. C., Ann., Title 29).

In other words, the respondent, doubtless unwittingly but nevertheless according to its own logic inevitably, is attempting not only to restore the doctrine of the *Bedford* and *Duplex* cases, but to carry it even further and to make it unlawful for a union to boycott the goods of non-con-

forming employers with whom it is engaged in a labor dispute, and also to make it unlawful for the union to persuade its own employers to accede to the union's demands that their shops be closed against such goods.

(2) The respondent seeks to escape the immunity given by the Clayton and the Norris-LaGuardia Acts to a union in a labor dispute to cease to "patronize" and to "persuade" and "agree" with "others" "so to do," by arguing that these words only (p. 28)

> "describe the boycotting of a product by ultimate purchasers or consumers and propagandizing on behalf of such boycott."

Any such limitation defies the unrestricted scope of the words used. It is merely the latest example of the unceasing effort to have this Court hold that these Acts mean less than they say, and to restore "the tangled verbalisms" which those Acts were intended to "cut through." "Such legislation must not be read in a spirit of mutilating narrowness." (*U. S.* v. *Hutcheson*, 312 U. S. 219, 235, 236.)

The respondent cites no precedent for its proposed limitation; and that limitation was itself squarely rejected in the decisions cited on pages 37 to 45 of the Main Brief for the United Brotherhood. See particularly *U. S.* v. *American Federation of Musicians*, 318 U. S. 741.

IV

The respondent's effort (pp. 2, 20) to present the agreements of 1936 and 1938 as nothing but an undertaking by local manufacturers not to purchase millwork from other states, made under a lower wage scale, is a distortion of those agreements and is irrelevant to the issues on this review.

It is unfortunate that in quoting from paragraph 16 of the agreement of 1936 and from paragraph 17 of the agreement of 1938 the respondent has in each case chopped off and omitted the introductory part of the sentence which it quotes.

Thus, at page 11, in purporting to quote paragraph 16 of the agreement of 1936, the respondent omits the sentence's introductory and qualifying words "in the interest of standardization of rates of wages and working conditions" (283). So likewise at page 12, in purporting to quote paragraph 17 of the agreement of 1938, the respondent omits the sentence's introductory and qualifying words "in the interest of providing employment" (293).

These words thus expunged by the respondent from its quotations of the respective closed-shop paragraphs are the characterizing words which define the purpose and objective of the respective paragraphs, and which establish the meaning of the paragraphs to be that in conformity with the unions' refusal to work on articles made under less favorable wages and working conditions, their employers will not purchase such articles for manufacture.

The agreements of 1936 and 1938 relate exclusively to manufacture. The employers were manufacturers and the union employees were workmen engaged in the manufacture conducted by the employers. Paragraph 16 of the agreement of 1936 and paragraph 17 of the agreement of 1938 were definitions of what each party would do in

connection with this process of manufacture, conducted in the factories of the employers, in view of the fact that the employers were acceding to the demands of the union that such factories be closed shops—closed not only against non-union employees but also against articles made under less favorable wages and working conditions. Such a closed shop was lawful. (See Clayton and Norris-LaGuardia Acts, and cases cited at pages 29 and 30 of the United Brotherhood's Main Brief.)

This aspect, purpose and objective of these two paragraphs we sought to get before the jury by various requests to charge, all of which were refused (1558, 1561-2, 1549); and, as already stated, the trial court instructed the jury that these agreements constituted a combination and that if restraint of interstate commerce was their consequence, they were automatically violative of the Sherman Act (1153).

The trial court consistently and expressly ruled out evidence offered by the union defendants to prove their purpose and intent (1483-4, 1497-8, 1500-4).

We do not understand that the respondent ventures to claim that the unions acting alone could not lawfully demand that their manufacturing employers should not purchase for manufacture articles made under less favorable wages and working conditions. How then can the manufacturers' accession to this demand convert the unions into criminals?

Moreover, and aside from these considerations, the unions had a perfect right under the Clayton Act and the Norris-LaGuardia Act to quit work if the manufacturers employing them purchased articles to be worked on which were made under less favorable labor conditions. They also had the right to advise and persuade their employing manufacturers not to "patronize" the non-conforming manufacturers (wherever situated) with whom, as the respondent itself concedes, these unions were engaged in

a labor dispute (p. 28); and they had the further right to agree with their own employing manufacturers that there would not be such patronizing. Such acts are not "violations of any law of the United States" (Clayton Act and Norris-LaGuardia Act, U. S. C. Ann., Title 29, Secs. 52 and 104).

V

The factual differences between the present case and the *Allen Bradley Company* case (145 Fed. (2d) 215).

At page 36 the respondent attacks the holding of the Circuit Court of Appeals for the Second Circuit in *Allen Bradley Co.* v. *Local Union No. 3*, 145 Fed. (2d) 215.

In view of this attack and in view of the fact that an article in the Harvard Law Review for December, 1944 (p. 273) treats the present case and the *Allen Bradley* case as factually identical, we enumerate the following outstanding factual differences:

1. In the agreements of 1936 and 1938 in the present case there was no ban on articles merely because of geographical origin. The test was not source but wages and working conditions or union label (982, 896-901). On the other hand, in the *Allen Bradley* case the ban was against articles made outside the Metropolitan Area, irrespective of wages, working conditions or union affiliation.

2. The closed shops created by the agreements of 1936 and 1938 operated as against non-conforming employers anywhere,—including those in the Bay Area itself.

3. In the *Allen Bradley* case, according to the opinion (p. 218), "Local 3 promised" the local manufacturers and contractors "an exclusive market within the city so that they could name their own prices to

offset increased production costs". No such promise and no such purpose were expressed in the agreements of 1936 and 1938. Under those agreements the local signing manufacturers were not protected in the slightest from competition from other manufacturers wheresoever situated who actually did conform as to wages and working conditions.

4. In the *Allen Bradley* case, according to the opinion (p. 218), it was agreed that union members "should work only on switchboards of local manufacture by union shops". The contracts of 1936 and 1938 in the present case expressed no such agreement. Work was not confined to articles "of local manufacture by union shops".

5. In the *Allen Bradley* case there was a three-cornered agreement. The agreement was between three groups—manufacturers, contractors and union —; and, according to the opinion (p. 218), it was agreed that "the contractors should have the sole power to buy materials for any job". In the present case, the agreement was solely between the union and the signatory employing manufacturers; and, there was no agreement that contractors (or, indeed, anyone else) should have the sole power to buy materials for any job.

As regards the law for the present case, we find the following excellent statement in the aforesaid article in the Harvard Law Review of December, 1944 (p. 277):

"If the disputes were labor disputes, (20) as construed in recent Supreme Court cases, allows them to be carried on by means of refusals to work on non-union made materials. Such being the case, the fact that a particular employer capitulates and agrees to use no more of the offending material should not constitute a criminal conspiracy between employer and union. To permit the union to wage war but to stigmatize the signing of a treaty of peace as criminal behavior by the union and by its defeated and now compliant adversary, would be grotesque. Nor

should the fact that such a surrender by a contractor would benefit local manufacturers as well as the local union affect the legal situation so long as the union's objective were its own economic advantage."

VI.

The respondent's own concessions illustrate why the decisions which it cites are wholly inapplicable.

U. S. v. Brims, 272 U. S. 549

There is little which we wish to add to our discussion of this case at page 48 of the Main Brief for the United Brotherhood and at pages 15 and 40 of the Main Brief for the Bay Counties District Council, *et al.*

Three months after that decision the Congress manifested its reaction by passing the appropriation bill of February 24, 1927, c. 189, Title 2, 44 Stat. 1194, which provided that no part of the appropriation for the enforcement of the anti-trust laws "shall be spent in the prosecution of any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours, or for any act done in furtherance thereof not in itself unlawful". Here, obviously, were a congressional [illegible]ate not to extend prosecutions to activities arising from *bona fide* labor union demands and also a foreshadowing of the Norris-LaGuardia Act.

A case which arises from a labor dispute involving a union campaign for unionization and demand for higher and standardized wages is the antithesis of a conspiracy hatched by a group of local manufacturers to stifle competition from outside and to use union members as tools to that end.

The real nature of the *Brims* case is clearly disclosed in both the prevailing and dissenting opinions in *Bedford*

Cut Stone Co. v. *Stone Cutters' Assn.*, 274 U. S. 37,—decided two months after the *Brims* case. Of the *Brims* case the prevailing opinion said (p. 52):

> "In *United States* v. *Brims*, 272 U. S. 549, a criminal case, this court dealt with a combination of manufacturers, contractors and carpenters in Chicago, having for its object the destruction of the competition of nonunion mills in Wisconsin and elsewhere by the employment in Chicago of union carpenters only, with the understanding that they would refuse to install nonunion-made millwork."

Of the *Brims* case the dissenting opinion said (p. 64):

> "Moreover the purpose of the combination was not primarily to further the interests of the union carpenters. The immediate purpose was to suppress competition with the Chicago manufacturers."

The Second Coronado Case, 268 U. S. 295

This case militates against rather than for the respondent.

There the defendant unions destroyed coal mines for the very purpose of stopping the production and shipment in interstate commerce of non-union coal into other states where it would, by competition, tend to reduce the price of the commodity and thus affect injuriously the maintenance of wages for union labor in competing mines. The defendant unions were not employed in the plaintiffs' mines. As this Court said (p. 305):

> "The only issue is whether the outrages, destruction and crimes committed were intentionally directed toward a restraint of interstate commerce."

Obviously, such "outrages, destruction and crimes" were not legitimate labor activities and were not licit means for the accomplishment of any licit labor objective. Since they were done in concert by various unions for the

very purpose of restraining interstate commerce, such criminal conduct was not immunized by any provisions of the Sherman Act, the Clayton Act or the Norris-LaGuardia Act. This Court, therefore, reversed a directed verdict for the defendants and remanded the case for a new trial.

But in the instant case, there was no such conduct and no use of unlawful means; and any intent or purpose on the part of the union defendants to serve their self-interest or to accomplish a labor objective was, as the respondent's brief concedes (pp. 2, 21), ruled immaterial.

The Borden Case, 308 U. S. 188

This was a *non-labor* case. It did not involve a labor dispute. The issue was as to the effect of the Capper-Volstead Act on a price-fixing combination engaged in by farm producers.

In that case we find a price-fixing agreement which was ruled to be illegal *per se* for lack of some immunizing statute. In the present case we find, in the last analysis, a closed-shop agreement immunized by several statutes but ruled by the courts below to be illegal *per se*.

VII

The respondent's brief has not justified the erroneous instructions and refusals to instruct concerning criminal liability of the unions for the acts of agents.

The District Court charged the jury that the unions would be responsible criminally for any act which an agent "assumed to do while performing duties actually delegated to him" (1137).

On the other hand, the Norris-LaGuardia Act (sec. 106, U. S. Code, Ann., Title 29) requires "clear proof of actual participation in, or actual authorization of", such act, or ratification "after actual knowledge thereof".

The word "actual", thus twice repeated, demands what is objectively real and excludes what is merely constructive or imputed.

If an agent is delegated to do an act, and such act is itself criminal, criminal responsibility attaches to the principal. But it would be an intolerable doctrine that a principal is liable criminally for any act which his agent "*assumes*" to do while performing lawful duties actually delegated. Delegation of authority to do lawful things certainly can not create criminal responsibility for an unlawful act which the agent may "assume" to do while engaged in the business of the principal.

The question here is not one of phrasing but of substance. The instruction given was obvious error, and very prejudicial. The instructions requested by the union organizations and individual member defendants were based upon the tests of the Norris-LaGuardia Act (1172-3). The same rule obtains under general principles of criminal law.

The instruction given is without precedent in any criminal case. The quotation from *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 544, was a civil case; involving only civil liability and the civil principle of imputed responsibility.

The case of *New York Central R. R.* v. *United States*, 212 U. S. 481, cited by the respondent, is a leading case for the proposition that a criminal statute, which by its terms adopts the civil test as to responsibility of a corporation for acts of an agent, may be constitutional in cases where the offense (as there charged) is the omission of a required act. That decision, when analyzed, works against the respondent on the question here involved. The Elkins Act, under which the case arose, 32 Stat. 847, provided in part as follows:

> "In construing and enforcing the provisions of this section the act, omission, or failure of an officer, agent, or other person acting for or employed by any

common carrier, acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person."

The equivalent is not to be found in the Sherman Act; and the offense here charged is not the omission of an act required by law, but the affirmative doing of a prohibited act.

In fact, culpability for what the agent "has assumed to do" reaches even beyond the vice of the instruction condemned in *United States v. International Fur Workers Union*, 100 Fed. (2d) 541, to the effect that a union would be criminally liable if its officers acted "upon behalf of the union". The latter instruction is at least not affirmatively inconsistent with the presence of actual authority or ratification.

The customary charge as to proof beyond a reasonable doubt is suggested by the respondent as a cure. But that charge could have no bearing upon an erroneous instruction predicating the principal's responsibility for a criminal act which an agent had "assumed" to do while performing lawful duties actually delegated.

For further discussion of this subject, see pages 52-58 of the Main Brief for the United Brotherhood.

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Respectfully submitted,

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